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**Heartwood Home Health & Hospice, LLC, Plaintiff/Appellant, v.
Rita Huber and Glenna Molyneux, Defendants/Appellees : Reply
Brief**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HEARTWOOD HOME HEALTH &
HOSPICE, LLC,

Plaintiff/Appellant,

vs.

RITA HUBER and GLENNA
MOLYNEUX,

Defendants/Appellees.

Case No. 20170221-CA

REPLY BRIEF OF APPELLANT

Appeal from a Judgment
Entered by the Third Judicial District Court,
Honorable John Paul Kennedy Presiding

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INTRODUCTION

Heartwood Home Health & Hospice, LLC (“Heartwood”) is seeking review of the district court’s decision to impose Rule 11 sanctions based on its determination that Heartwood should have withdrawn its complaint after discovery and not opposed the defendants’ summary judgment motion. As support for its appeal, Heartwood devoted a great deal of its opening brief to detailing all of the facts it relied on as support for both its complaint and its opposition to summary judgment. For example, Heartwood went into great detail outlining all of the meetings between Ms. Huber and other Heartwood employees after Ms. Huber left Heartwood to work for Good Shepherd Home Care & Hospice (“Good Shepherd”), as well as all of the evidence showing that Ms. Molyneux had contacted Heartwood’s patients in order to have them transfer to Good Shepherd. Based on these facts, Heartwood contends that the district court erred when it imposed Rule 11 sanctions.

In response, defendants Glenna Molyneux and Rita Huber do not even address whether the foregoing facts justified Heartwood’s decision not to withdraw its complaint. In other words, the defendants made no argument whatsoever as to why they believe these facts did not provide an objectively reasonable basis for Heartwood’s decision to pursue its complaint and oppose their summary judgment motion. Rather, the defendants only present procedural arguments as to whether Rule 11 imposes an ongoing duty to review previously submitted filings and whether the district court was entitled to impose Rule 11 sanctions based on an opposition to summary judgment. Since no effort was made to

address the substantive evidence presented by Heartwood as support for its decision to file the complaint and oppose summary judgment, this Court must reverse the district court's decision to impose Rule 11 sanctions.

Heartwood is also appealing the district court's decision to grant summary judgment and dismiss Heartwood's contract and tort claims. Defendants argue that summary judgment was appropriate because Heartwood failed to present sufficient facts in its Rule 30(b)(6) deposition to support all its claims. However, defendants again fail to address the other testimony and evidence which Heartwood presented as support for its claims. Such evidence was sufficient for purposes of summary judgment. Therefore, the district court's decision to dismiss Heartwood's claims must be reversed.

RESPONSE TO APPELLEES' STATEMENT OF FACTS

In their opening statement of facts, defendants contend that when Heartwood's owner, Lee Vasic, was asked in his deposition to identify facts supporting the allegations in Heartwood's complaint, "Vasic responded that there were no facts supporting the allegations or that the allegations were just assumptions." (Appellee Brief at 8). This is simply untrue. As will be shown more fully below, Mr. Vasic typically responded to counsel's deposition questions by identifying circumstantial evidence which he believed supported the allegations in the complaint. Upon further questioning, Mr. Vasic would then state that he personally had no first-hand knowledge, i.e., direct evidence, to support the allegations. This is significantly different than saying he had "no facts" as defendants allege.

In order to demonstrate the foregoing, Heartwood will set forth relevant allegations from the defendants' summary judgment motion in which defendants claimed that Heartwood had "no facts" to support particular allegations in its complaint. These will then be followed by the actual deposition testimony upon which each of the defendants' allegations is purportedly based:

Statement of Fact No. 6

Heartwood has no facts to support the allegation that Rita Huber recruited Merrill Nielsen to work for Good Shephard [sic]. Compare Complaint at ¶17. (Vasic Depo. 71:-72:20).

(R. at 441)

Relevant testimony

Q. So what facts do you have that Ms. Huber contacted Mr. Nielson and persuaded him to leave Heartwood?

A. He was going to lunch with her after she had quit Heartwood, and it seemed like he did that for a couple of weeks in a row. And then I'm not even sure we knew at the time she was working for Good Shepherd. And then, all of a sudden, he – we found out she was working at Good Shepherd; and then, all of a sudden, he quit and went to Good Shepherd. So, you know, our understanding was that's probably why he went to Good Shepherd.

Q. Okay. You say "understanding." Do you mean assumption?

A. Assumption, yeah.

Q. Okay. So you have no fact—

A. I have no facts on that.

(R. at 340).

Statement of Fact No. 8

Heartwood has no facts to support the allegation that Rita Huber persuaded Glenna Molyneaux [sic] to move to Good Shephard [sic]. Compare Complaint at ¶20. (Vasic Depo. 79:1-4).

(R. at 442).

Relevant testimony

Q. “Based on information and belief, Ms. Molyneux left Heartwood after she was contacted directly by Ms. Huber and Mr. Nielson and persuaded to do so.”

A. Yes.

Q. Again, I’d like to know what facts you have to support that statement.

A. Glenna told me that’s why she was – in fact, that’s – that might have been where we thought Mr. Nielson was the DON [Director of Nursing], because Glenna told me she was going to go to Good Shepherd and that – Mr. Nielson was there.

Q. And did she say that Mr. Nielson persuaded her to go?

A. Not-not in so many words, just that he went there. She was sad that he was gone. And she was fasting and praying where she should go, and then all of a sudden, she decided to go to Good Shepherd.

Q. Okay. Is there evidence that Ms. Huber persuaded Glenna to go to Good Shepherd?

A. I think she mentioned that Rita was over there also.

(R. at 342).

Statement of Fact No. 9

Heartwood has no facts to support the allegation that Good Shephard [sic] made an agreement with Glenna Molyneaux [sic] to get patients from Heartwood. Compare Complaint at ¶ 20. (Vasic Depo. 79:11-80:9)

(R. at 442).

Relevant testimony

Q. Okay. Paragraph 21: "Based on information and belief, Good Shepherd hired Ms. Molyneux in exchange for Ms. Molyneux's agreement to contact Heartwood's employees and try to persuade them to begin working for Good Shepherd." What evidence do you have, or facts, to support the-- that there was an agreement between Ms. Molyneux and Good Shepherd to contact Heartwood's employees?

A. Just her passion for trying to get people to go to Good Shepherd.

Q. Glenna's passion?

A. Yeah. Suddenly, Good Shepherd was the best thing since sliced bread. So--and so, of course, we think: Why is she trying so hard to get everyone to go over there, you know?

Q. Uh-huh (Affirmative).

A. So, I mean, it was a--it was probably a conclusion we made: They must be giving her some kind of a bonus or something to get these patients and all these employees to go over there.

Q. Now, she testified that she got no recruiting bonuses, and Good Shepherd testified that they gave no recruiting bonuses to any of them. What--are there any facts to support that she--

A. There are no facts.

Q. Just the assumption?

A. Just the assumption, and her--and how hard she fought to--I mean, she--for example, the person that replaced her was going to see a patient on the first morning that she had worked for Good Shepherd, and Glenna called that CNA and said, "You don't need to come here. This person's coming to Good Shepherd." And when that CNA got to the patient's house, Merrill and Glenna were there and the CNA walked in. And the patient said, "I don't want to go with Good Shepherd. These guys are telling me I have to."

Q. That's what the patient said?

A. Yeah. And then Glenna said, "No, we're just saying our good-byes. We just want to come and say good-bye," you know, and--so yeah, our conclusion is: Man, they're sure fighting hard to get these patients. There must be some kind of compensation going on here, because that's the first day--I think that was the first day she worked for Good Shepherd she's at one of my patient's homes first thing in the morning, calling my staff, telling them "Don't come."

(R. at 342-43).

Statement of Fact No. 12

Heartwood doesn't know what, if anything, Rita Huber or Glenna Molyneaux [sic] that was false or disparaging but he knows Merrill Nielsen said demeaning things about Heartwood. Compare Complaint at ¶23. (Vasic Depo. 87:20-90:3).

(R. at 442).

Relevant testimony

Q. Okay. So to your--to your personal knowledge, you don't know that Ms. Huber made any false statements about Heartwood?

A. I know she made some statements; I just don't know what they are. I don't have a recollection. But the person she made the statement to knows.

Q I--and that's why I'm asking--the way I formulated the question was, to your personal--

A Right.

Q --knowledge, meaning what you know from seeing, hearing--

A. Right.

Q --do you know that she made any--Rita Huber made any false statements about Heartwood?

A. Well, I want to answer this by saying I know she did. I just don't know what they were. So I guess I can't say I know. I just know Scott said she did. But I don't know what they were.

Q. Okay. So any knowledge you have would be based on what Scott told you; is that--

A Yes.

Q --accurate?

A Yes.

Q Okay. And then the same question with Ms.—with respect to Ms. Molyneux.

A I don't--I don't remember at this point who she talked to or what she said.

(R. at 344-45).

Statement of Fact No. 14

Heartwood has no facts to support the allegation that Rita Huber said demeaning things. Compare Complaint at ¶23. (Vasic Depo. 93:17).

(R. at 442).

Relevant testimony

Q Okay. And do you have any personal knowledge that Rita Huber misinformed Heartwood's patients?

A No.

(R. at 346). In this instance, the testimony cited by defendants shows that Mr. Vasic was not asked whether Ms. Huber had ever stated “demeaning things.” Moreover, Heartwood is not claiming that Ms. Huber contacted Heartwood patients. Rather, it is claiming that she contacted Heartwood employees

Statement of Fact No. 15

Heartwood has no facts to support the allegation that Glenna Molyneaux demeaned them other than when she was sitting next to Merrill Nielsen who was speaking. Compare Complaint at ¶23. (Vasic Depo. 93:22)

(R. at 442).

Relevant testimony

Q. “[T]he last sentence says, “In doing so, the individual defendants have knowingly and intentionally misinformed Heartwood's patients concerning the terms of their contracts to induce them to terminate their contracts with Heartwood.” I just wanted to ask, which defendants have knowingly and intentionally misinformed Heartwood's patients concerning the terms of their contracts?

A. Mr. Nielson and Glenna.

Q And what was the misinformation they stated?

A They also said that Heartwood was going bankrupt and unethical and that Medicare wouldn't continue to pay for their service if they stayed with Heartwood.

Q Glenna said that?

A To my knowledge, Glenna was in--was sitting next to Mr. Nielson when he said that.

Q And who did he say that to?

A He said that to a patient. I can't remember—I think I have a patient statement saying that. And I have—I have Maria saying she heard them saying that as well.

(R. at 345-46).

Statement of Fact Nos. 16 and 23

Glenna Molyneaux [sic] didn't recruit patients before she left though Julie Widner might have. Compare Complaint at ¶15, 18. (Vasic Depo. 106:15-24).

(R. at 443).

Relevant testimony

Q. And any of this alleged recruiting occur after my clients had left your employ?

A. Well, while Glenna was working there her last week, we started getting faxes. And when we called the patients and said, "Why are you leaving?" they go, "Because we hear Glenna's leaving." And later we found out that Julie Widener was going out in some cases and telling the patients, "Glenna's leaving. You need to come over to Good Shepherd." So recruiting—yeah, recruiting was happening right at that last week.

(R. at 349).

Statement of Fact No. 18

Heartwood has no facts to support the allegation that Good Shephard [sic] instructed the Defendants to make improper statements to patients. Compare Complaint at ¶23. (Vasic Depo. 101:2-5)

(R. at 443).

Relevant testimony

Q. Do you know whether Good Shepherd ever instructed either of the three individual defendants to make any of those statements to the patients?

A. I do not.

(R. at 348). In this instance, the defendant's statement of fact was inaccurate and misleading. Contrary to the allegation, Heartwood's complaint does not allege that Good Shepherd ever instructed the defendants to make any improper statements to patients (R. at 18). This was simply a question which Mr. Vasic was asked in his deposition.

Statement of Fact No. 19

Heartwood has no facts to support the allegation that Good Shephard instructed Defendants to make statements to employees. Compare Complaint at ¶23. (Vasic Depo. 101:12-19)

(R. at 443).

Relevant testimony

Q And do you have any facts, personal information to establish that Good Shepherd instructed or asked the individual defendants to make statements to the other employees ... meaning Heartwood's employees....

A. I do not.

(R. at 348). Again, the defendant's statement of fact was inaccurate and misleading. Contrary to the allegation, Heartwood's complaint does not allege that Good Shepherd ever instructed the defendants to make any improper statements to Heartwood's employees. (R. at 18). This was simply a question which Mr. Vasic was asked in his deposition.

ARGUMENT

I. DEFENDANTS CONCEDE THAT SANCTIONS WERE BASED ON HEARTWOOD’S OPPOSITION TO DEFENDANTS’ SUMMARY JUDGMENT MOTION, A DOCUMENT WHICH DEFENDANTS NEVER CHALLENGED PURSUANT TO RULE 11.

At the time defendants filed their Rule 11 motion, they were clearly challenging the sufficiency of Heartwood’s complaint as of the time it was filed. In fact, the motion itself expressly alleged that “the Plaintiff *commenced this action* without factual or legal basis for said claims.” (R. at 555) (emphasis added).

Despite their initial challenge to the complaint itself, defendants now concede that the district court’s sanctions were not based on any findings that Heartwood violated Rule 11 when it presented its complaint for filing. *See* Appellees’ Brief at 16. (“[T]he trial court did not base its decision on the fact that the content of the complaint was wrong when the complaint was filed.”). Rather, defendants openly admit that Heartwood was sanctioned for its decision to oppose the defendants’ summary judgment motion. For example, they state that Rule 11 applies to this case because “Heartwood’s response to the motion for summary judgment was by way of other papers which were signed asserting the legal and factual substance of Heartwood’s position under Rule 11.” *Id.*

Despite defendants’ arguments, there is nothing in the language of Rule 11 that subjects a plaintiff to sanctions for any papers they may file after a defendant challenges the sufficiency of a complaint pursuant to Rule 11. Rather, the rule expressly states that it

only looks to whether an attorney has satisfied certain obligations when “presenting” a pleading to the court. Utah R.Civ. P. 11(b).

There is language in Rule 11 which states that the presentation of a pleading includes “advocating” a pleading. *Id.* Defendants seize this language to argue that Heartwood was advocating its complaint when it opposed defendants’ summary judgment motion and therefore the opposition violated Rule 11. However, defendants served their Rule 11 Motion on October 15, 2013. (R. at 440). This was approximately three weeks before defendants filed their summary judgment motion (R. at 297) and almost two months before Heartwood filed its opposition to summary judgment. (R. at 472). It is unclear how a motion for sanctions can be directed towards an opposition memorandum that was not even drafted when the motion for sanctions was served.

If defendants believed that the Heartwood’s opposition to their summary judgment motion lacked sufficient evidentiary support so as to violate Rule 11, they should have filed a Rule 11 motion that attacked the opposition memorandum itself. They chose not to do so. As such, the district court was not entitled to look at Heartwood’s opposition to summary judgment as a basis for awarding sanctions for the purported insufficiency of Heartwood’s complaint.

Defendants attempt to justify the district court’s decision by arguing that Heartwood had an ongoing duty to review the sufficiency of its complaint as the case progressed. However, as Heartwood demonstrated in its opening brief, a plaintiff is not subject to sanctions for the filing of its complaint simply because the complaint is subsequently

dismissed at a later time. *See, e.g., Tahfs v. Proctor*, 316 F.3d 584, 595 (6th Cir. 2003) (“A complaint does not merit sanctions under Rule 11 simply because it merits dismissal pursuant to Rule 12(b)(6)”); *Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, LP*, 171 F.3d 52, 58 (1st Cir. 1999) (“The mere fact that a claim ultimately proves unavailing, without more, cannot support the imposition of Rule 11 sanctions.”); *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 69 (3d Cir. 1988) (“Rule 11 may not be invoked because an attorney, after time for discovery, is unable to produce adequate evidence to withstand a motion for summary judgment.”). The fact is that defendants have failed to cite a single case where a plaintiff was subjected to Rule 11 sanctions for filing their complaint simply because a court subsequently granted summary judgment against the plaintiff.

Defendants also claim that the Tenth Circuit has used Rule 11 to impose a continuing duty on lawyers to review the sufficiency of their pleadings. This is not true. As Heartwood pointed out in its opening brief, the Tenth Circuit does not place a continuing obligation on parties and their attorneys to review the sufficiency of their pleadings. *See Griffen v. City of Oklahoma City*, 3 F.3d 336, 339 (10th Cir. 1993) (Rule 11 does not impose a continuing obligation on the signer to update previously filed pleadings). The cases which defendants cite do not change this holding whatsoever. For example, in *Automobile Assurance Financial Corp. v. Syrett Corp.*, 107 F.3d 20 (10th Cir. 1997), the Court never once discussed an ongoing duty under Rule 11. Rather, the decision upheld sanctions against an attorney who “failed to conduct an adequate inquiry *before filing* his

pleadings” *Id.* (emphasis added). Similarly, in *Findlay v. Banks*, 87 F.3d 1146 (10th Cir. 1996), the Court never discussed a party’s ongoing duty to review a complaint. Rather, the Court sanctioned a lawyer who had filed a memorandum with the bankruptcy court in which he improperly omitted important language from a statute. *Id.* at 1148-49. In other words, neither of these cases support the proposition for which defendants cite them, and they certainly do not reverse the Tenth Circuit’s decision in *Griffen*.

In sum, a party is not subject to Rule 11 sanctions for filing a complaint simply because it was later unable to produce facts sufficient to withstand a summary judgment motion. This is because the standard for summary judgment is very different than the one used for Rule 11 purposes. Unlike summary judgment, the focus in a Rule 11 motion is not on the admissible evidence that a party can produce at trial. Rather, the focus is on the reasonableness of the investigation that took place prior to the complaint being filed.

In this case, Heartwood has demonstrated that it conducted a reasonable investigation before it submitted its complaint in this matter. Furthermore, it has produced substantial circumstantial evidence which strongly suggests that the defendants did, in fact, commit the acts alleged in the complaint. As such, Heartwood’s decision to file its complaint was entirely reasonable. It certainly does not give rise to the type of “exceptional circumstances” to which Rule 11 is intended to apply. Therefore, the Rule 11 sanctions imposed against Heartwood were not justified, and the district court’s ruling must be reversed.

II. THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN DEFENDANTS' FAVOR.

A. Defendants Grossly Mischaracterize Mr. Vasic's Deposition Testimony.

As part of their Brief, the defendants argue that Heartwood's owner, Lee Vasic, consistently testified in his deposition that Heartwood had "no evidence to support the operative paragraphs of its complaint." (Appellee's Brief at 18). They go on to mischaracterize his testimony as "no facts" testimony. However, as shown more fully above, this is simply untrue. In fact, the defendants make no attempt to list the requisite elements for each of Heartwood's claims or show the specific portion of Mr. Vasic's deposition where he purportedly admitted that he had no facts with which to satisfy each element. Rather, defendants simply make unsupported and conclusory allegations that Mr. Vasic was unprepared and unable to support Heartwood's case.

The fact is that Mr. Vasic did provide testimony about the facts which he believed supported the allegations in his complaint. For example, when asked what facts he had to support Heartwood's allegation that Ms. Huber had been recruiting Heartwood employees to come to work at Good Shepherd, Mr. Vasic testified about the facts that one of Heartwood's long-time employees suddenly quit and began working for Good Shepherd after having a several lunches with Ms. Huber. (R. at 340). Similarly, when asked what facts Heartwood had to support its allegations that Ms. Molyneux had attempted to get Heartwood patients to switch their care to Good Shepherd, Mr. Vasic testified that Ms. Molyneux had visited her former Heartwood patients while working for Good Shepherd

and had told the patient's CNA that the patient was going to transfer their care. (R. at 342-43). While such evidence may be circumstantial, it undoubtedly contradicts defendants' assertion that Mr. Vasic said he had "no facts" to support Heartwood's claims.

Moreover, defendants' arguments completely ignore all the other admissible evidence which Heartwood submitted as support for its claims and which defendants made no attempt to dispute. For example, defendants do not address the evidence of meetings with Heartwood employees during which Ms. Huber would discuss employment opportunities at Good Shepherd and the employees' current dissatisfaction with Heartwood. (R. at 466-67). Nor do they address the fact that two of the employees with whom Ms. Huber met quit Heartwood and began working for Good Shepherd. (*Id.*) The fact that two of Ms. Huber's former co-workers followed her to Good Shepherd within two months of Ms. Huber's departure from Heartwood, when coupled with Ms. Huber's admission that she discussed job openings at Good Shepherd with these same two employees, undoubtedly creates a strong inference that Ms. Huber contacted these former co-workers in violation of her contract and persuaded them to leave Heartwood and begin working for a competitor.

Defendants also do not address the fact that six of Heartwood's patients who had received care from Molyneux at Heartwood transferred their care to Good Shepherd within days after Ms. Molyneux's departure. (R. at 476). They also ignore the fact that four of these six patients completed "Start of Care Worksheets" for Good Shepherd which identified "Glenna Molyneux" as the person who referred them to Good Shepherd. These

worksheet entries, when combined with the timing of the patients' transfers to Good Shepherd, create a compelling inference that Ms. Molyneux contacted the patients to persuade them to transfer their care to Good Shepherd.

Based on the foregoing, it is insincere for defendants to claim that Heartwood somehow admitted that it had "no facts" to support its claims. Mr. Vasic identified specific circumstantial evidence which he believed supported Heartwood's allegations. Heartwood also produced testimony and evidence from other parties which supported its claims that defendants interfered with Heartwood's employment and patient relationships. Therefore, Heartwood respectfully requests that this Court reverse the district court's decision to grant summary judgment in defendants' favor.

B. The Sham Affidavit Doctrine Has No Application to Heartwood's Opposition to Defendants' Summary Judgment Motion.

As stated more fully above, defendants make no attempt to address or dispute the deposition testimony and exhibits which Heartwood submitted in opposition to defendants' summary judgment motion. Instead, defendants seek to exclude such evidence pursuant to the "sham affidavit" doctrine. However, this doctrine has no application because neither Heartwood nor its representatives ever submitted an affidavit in opposition to defendants' summary judgment motion. Rather, Heartwood relied entirely on the parties' deposition testimony, as well as documents produced by the parties during discovery.

In explaining the sham affidavit doctrine, Utah courts have stated that "when a party takes a clear position in a deposition, that is not modified on cross-examination, he may

not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy.” *Webster v. Sill*, 675 P.2d 1170, 1172-73 (Utah 1983). In this case, neither Heartwood nor Mr. Vasic ever submitted an affidavit to the court that contradicted Mr. Vasic’s Rule 30(b)(6) testimony. In fact, Heartwood did not submit any affidavits in opposition to the defendants’ summary judgment motion. Rather, Heartwood’s opposition was based entirely on the pleadings, the defendants’ depositions and documents which were produced by the parties during discovery. (R. at 473-79). Therefore, since Heartwood never submitted any affidavits which contradicted its deposition testimony, the sham affidavit doctrine has no application to this case.

Defendants also claim that this Court previously held in *Uintah Basin Med. Ctr. v. Hardy* that the sham affidavit doctrine applies to any affidavit submitted on a party’s behalf, as opposed to just a party’s personal affidavit. *See* 2005 UT 92, 110 P.3d 168. However, defendants misstate this Court’s decision. In *Hardy*, this Court actually disagreed with the district court’s decision to exclude an affidavit submitted by the defendant pursuant to the sham affidavit doctrine. *See id.* at ¶ 14, fn1. Moreover, the affidavit at issue was not submitted by a third-party on the defendant’s behalf. Rather, it was the defendant’s own affidavit in which he attempted to explain what he understood a contractual provision to mean. *Id.* at ¶ 14. Therefore, this Court did not expand the sham affidavit doctrine as defendants represented in their brief.

Finally, other than conclusory statements, defendants fail to explain how the

evidence which Heartwood submitted in opposition to summary judgment contradicted Mr. Vasic's deposition testimony. For example, Mr. Vasic never denied that (1) Ms. Huber met certain Heartwood employees for lunch shortly before they quit Heartwood and started working for Good Shepherd, (2) Ms. Huber discussed job opportunities at Good Shepherd with these employees, (3) six patients which Ms. Molyneux treated at Heartwood transferred their care to Good Shepherd within days of Ms. Molyneux starting work at Good Shepherd, and (4) four of the six patients who transferred their care to Good Shepherd filled out forms listing Ms. Molyneux as the person who referred them to Good Shepherd. Therefore, even if the sham affidavit doctrine did apply to evidence other than personal affidavits (which it does not), the doctrine would still not apply to this case.

C. Defendants' Non-Solicitation Agreements Do Not Preclude Defendants from Competing with Heartwood.

As support for their summary judgment motion, defendants reiterate the district court's determination that the defendants' confidentiality agreements are unenforceable because they constitute an unlawful restraint of trade. Heartwood addressed the district court's ruling in its opening brief and will not reiterate its arguments herein. *See* Appellant's Opening Brief at 53-55.

In addition, and like the district court's ruling, the defendants' arguments are all premised on an assumption that the relevant employment agreements preclude defendants from competing with Heartwood and/or place restrictions on the defendants' future employment. This is not true. There is nothing in these agreements that places limits on

where or by whom defendants may be employed after they leave Heartwood. Rather, the agreements simply preclude the defendants from soliciting Heartwood's employees and patients. As such, the case law which defendants cite has no application to the defendants' contracts, because all the cited cases deal with non-competition agreements. The fact is that neither the defendants nor the district court cited a single case in which a Utah court has invalidated a non-solicitation agreement for the reasons stated in the district court's ruling. Therefore, the district court's decision to invalidate the parties' agreement as an unlawful restraint of trade must be reversed.

D. The Exclusive Remedy Clause Which Defendants Cite Has a Limited Scope and Does Not Apply to the Present Dispute.

Defendants also argue that summary judgment is appropriate because the defendants' confidentiality/non-disclosure agreements purportedly contain an exclusive remedy provision which lists termination and discipline as the only remedies available to Heartwood. However, it must be emphasized that defendants never actually quote or set forth the relevant provision in their brief. This is not surprising, as the relevant provision has no application to the present dispute.

The provision in the defendants' contracts which contains the relevant exclusive remedy provision states as follows:

Caring for current or past Heartwood Home Health and Hospice patients on a private duty basis outside of your employment with HEARTWOOD HOME HEALTH & HOSPICE is strictly prohibited and will be grounds for immediate termination.

(R. at 493). In other words, the exclusive remedy provision cited by the defendants does

not apply to any breach of the agreement. It only applies to instances where an employee of Heartwood treats Heartwood patients on a private-duty basis.

In this case, Heartwood does not claim that Mss. Molyneux or Huber cared for any Heartwood patients on a private-duty basis while still working for Heartwood. Therefore, the exclusive remedy provision they cite has no application. Therefore, this court must reject defendants' argument that the contract does not support Heartwood's claims.

E. The Defendants' Duty of Confidentiality Extended Beyond Their Employment with Heartwood.

Defendants argue that "Utah case law is clear that an employee's fiduciary duty ends at the termination of employment...." (Appellee Brief at 22). In doing so, defendants cite the Utah Supreme Court's decision in *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, 94 P.3d 179. However, defendants do not quote any specific language from the decision; nor do they cite a specific paragraph. Therefore, it is unclear which portion of the decision the defendants are relying on for their legal conclusion.

Moreover, the *Young* decision did not include a general discussion of fiduciary duties. Rather, it was dealing exclusively with the duty of loyalty. 2004 UT 26 at ¶ 19. Heartwood concedes that the duty of loyalty ends with employment, which is why it expressly states in its opening brief that its claim for breach of the duty of loyalty is only being made against Ms. Molyneux for efforts she made to recruit patients to Good Shepherd while she still worked for Heartwood. (Appellant's Opening Brief at 57).

However, Heartwood has also stated claims against the defendants for breaching their duties of confidentiality. As discussed more fully in Heartwood's previous brief, this duty does extend beyond the termination of one's employment. *See Envirotech Corp. v. Callahan*, 872 P.2d 487, 496 (Utah App. 1994) ("[a] former employee may not use confidential information obtained during the course of his or her employment to compete after termination with his or her former employer.") Therefore, Heartwood's fiduciary duty claims are not barred by the fact that some of the defendants' conduct occurred after their employment with Heartwood ended.

III. DEFENDANTS ARE NOT ENTITLED TO ATTORNEYS FEES ON APPEAL.

Finally, defendants have requested an award of attorneys' fees on appeal. In doing so, defendants rely on a series of cases which have held that a party who is awarded attorney fees by the trial court as a "prevailing party" is also entitled to attorney fees on appeal. *See K.F.K. v. T.W.*, 2005 UT App 85, ¶¶ 2, 7, 110 P.3d 162 (attorney fees awarded where party had prevailed in opposing a Rule 11 motion); *Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998) (Attorney fees awarded to the "prevailing party" pursuant to Utah Code Ann. § 78-27-56); *Utah Dep't of Social Services v. Adams*, 806 P.2d 1193, 1197 (Utah App. 1991) (Attorney fees awarded to the "prevailing party" pursuant to Utah Code Ann. § 78-27-56).

In this case, the defendants were not awarded attorney's fees because they were the "prevailing parties." Rather, the fees were awarded as a form of sanction against

Heartwood pursuant to Rule 11. As such, the purpose of the sanctions was not to compensate the defendants for their fees. Rather, the purpose of the sanctions was “to deter repetition of such conduct or comparable conduct by others similarly situated.” Utah R.Civ. P. 11(c)(2). Defendants have not cited any case law which allows this Court to impose additional sanctions automatically under Rule 11 based solely on a sanctioned party’s decision to appeal. Rather, they would have to show that the papers which Heartwood filed on appeal were themselves filed in violation of Rule 11. No such argument has been made by the defendants.

Finally, it must be emphasized that this dispute regarding Rule 11 sanctions arose because Heartwood and the district court had differing views over the strength of the evidence Heartwood used to support its claims. Heartwood believed it had strong circumstantial evidence, while the district court believed such evidence constituted speculation. This Court has recognized the difficulty that arises when trying to draw a line between these two concepts. *See State v. Hester*, 2000 UT App 159, ¶ 16, 3 P.3d 725. (Recognizing that the difference between drawing a reasonable inference and merely speculating about possibilities is “sometimes subtle.”). Therefore, it is certainly not improper or frivolous for Heartwood to ask this Court to review the district court’s findings on this issue.


Based on the foregoing, Heartwood respectfully requests that this Court deny the defendants’ motion for attorneys’ fees.

CONCLUSION

Based on the foregoing, Heartwood respectfully requests this Court to reverse the district court's decisions (1) to impose Rule 11 sanctions against Heartwood, and (2) grant summary judgment in defendants' favor.

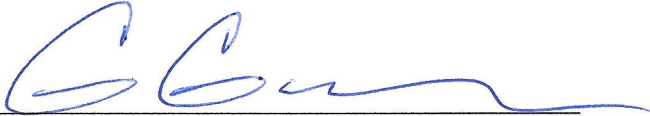
DATED this 20th day of November 2017.

RESNICK & LOUIS, PC

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Certificate of Compliance With Rule 24(f)(1)

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 6,195 words.
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point font size and in Times New Roman style.



GARY R. GUELKER

Dated: 11-20-17

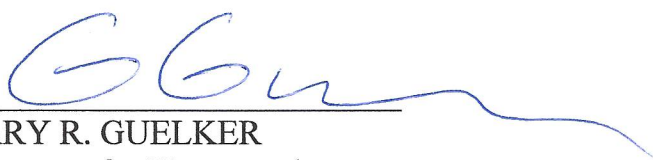
CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November 2017, I caused the foregoing **REPLY BRIEF OF APPELLANT** to be served on the following via electronic mail:

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By: _____


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